RAMLI ZAKARIA & ORS.

v.

THE GOVERNMENT OF MALAYSIA

FEDERAL COURT, KOTA BHARU
SUFFIAN LP
LEE HUN HOE CJ (BORNEO)
ABDUL HAMID OMAR FJ
[CIVIL APPEAL NO. 182 OF 1981]
12 AUGUST 1982

CONTRACT: *Vocational school teachers - Training course - Offer letter - Upon completion of course to be placed on the Unified Teachers Scheme (UTS) - Employed by School Board of Governors/Management - UTS abolished upon graduation - Placed on attachment - Offered pay under Aziz Scheme - Salary lower than UTS - Whether any breach of agreement - Rule 103 Service Circular No. 10/1971 - Contract not fulfilled - Whether on account of frustration - Whether discharged.*

This appeal was against the decision of Mohd. Zahir J (as he then was) dismissing the appellant's claim with costs [1982] CLJ (Rep) 719. The appellants' claim was for a declaration that they were entitled to salaries and allowances in accordance with the Unified Teachers Scheme (UTS) pursuant to the agreement entered into between the appellants and the respondents on 1 May 1969. The appellants were a group of 86 vocational school teachers who went through a course of teacher training upon their application being successful in response to an advertisement in the local press. There were letters of offer dated 16 January 1969 for the training sent to appellants which *inter alia* stated that the appellants would receive pay under the UTS upon completion of the training. However, upon graduation, they were put on attachment on 1 April 1972 as they had not then successfully completed their course of training, on a starting salary of RM230 p.m. (allowance), lower than UTS which was RM310 for men and RM275 for women. The date of completion of the course was on 6 June 1972 and by letter dated 21 September 1972 the appellants were offered a new scale under Aziz Scheme with a starting salary of RM370 as the UTS was no longer in existence and the only salary scale in force then was the Aziz Scheme.

The sole issue before the learned trial Judge was whether the appellants were entitled to be placed under UTS. The appellants appealed on the following grounds:

That the learned Judge erred in law and in fact in

(1) upholding the respondent's plea that the contract could not be fulfilled on account of frustration and that it has been discharged.

(2) not accepting the submission of the appellants that Circular 10/1971 did not apply to the appellants who were then not yet Government servants.

(3) not following the decision of *Thambipillai v. The Government of Malaysia* [1969] Vol. 2 MLJ p. 206.

(4) holding Service Circular 10/1971 as having the force of law at the material time.

(5) ...

(6) holding that r. 103 of Service Circular No. 10/1971 barred the appellants from being placed under the UTS scale.

Held:

[1] The agreement had spelt out quite clearly that the employment was to be at the option of the respondent exercisable at any time within twelve months of the completion of the course. The words "for the time being in force relating thereto" used in Clause 1(c) with reference to scales of salaries may be construed to mean that the appellants were to be subject to whatever scales of salaries relating to the post of a trained teacher in force at the time of employment.

[2] There was no substance in the appellants' argument that the Government was the author of the Aziz Scheme and itself effected the abolition of the UTS because in matters relating to qualifications for appointments and conditions of service the Government is the deciding authority and the power is provided by law. Such authority cannot be made subject to any agreement that may be entered into between the Government and another. Instead such agreement must be read subject to the authority by law conferred upon the Government. Therefore, there was no question of any self-induced frustration.

[3] The learned trial Judge made a correct finding of law when he had held that the conditions of appointment and conditions of service as embodied in Service Circular No. 10/ 1971 had the force of law. The Judge had made this finding in the light particularly of Article 132(2) of the Federal Constitution which empowers the Government to regulate the terms and conditions of persons in the public service.

[4] The introduction by the Government of a new salary scale cannot be said to have been effected with a view to denying the right, contractual or otherwise, of any particular person or group of persons. Neither was it the object of the respondent to escape performance of a contractual obligation under any contract. The Government had accepted the Aziz recommendations and in fact had put into force an improved salary scale and it was applicable to the appellants. Thus the UTS was abolished and had ceased to apply to the appellants.

[5] The decision in *Thambipillai's* case could not support the appellant's contention. In that case the learned Judge had regard to the nature and effect of that particular service circular when he had held that the service circular was no more than a mere declaration of policy. The same cannot clearly be said of Service Circular No. 10 of 1971.

[6] The only remaining point raised by the appellants that they should first be placed on UTS and then be allowed to opt to the salary scale under the Aziz Scheme was something that did not come within the purview of the Judge to deal with. The Judge quite rightly had confined himself to the appellants' claim as disclosed from the pleadings.

[7] The learned Judge had not erred in law and in fact in arriving at his decision; the Federal Court had reached the same conclusion although for somewhat different reasons.

[Appeal dismissed with costs.]

Cases referred to:
Thambipillai v. The Government of Malaysia [1969] 2 MLJ 206
C.B. Reilly v. The King [1934] AC 176

Legislation referred to:
Contracts Act 1950, s. 57(2)
Federal Constitution, art. 132(2)

Other sources referred to:
The Law of Contract in Malaysia and Singapore - Cases and Commentary, Visu Sinnadurai, p. 487/8
Chitty on Contracts - General Principles, 24th Edn., pp. 658/9, 660

For the appellants - A Gomez; M/s. A. Gomez & Co.
For the respondent - Abu Mansor bin Ali, SFC

JUDGMENT

Abdul Hamid Omar FJ:

This appeal is against the decision of Mohd. Zahir J (as he then was) dismissing the appellants' claim with costs.

The sole issue before the learned Judge was whether the appellants were entitled to be placed under the Unified Teachers salary scale (UTS).

The facts are not in dispute. The appellants are a group of 86 vocational school teachers who, in response to an advertisement in the local press, submitted their applications for teacher training and were successful. Letters of offer (*surat tawaran*) dated 16 January 1969 for teacher training were sent to them. One of the conditions stated in the letter of offer relates to the pay they would receive upon completion of the training. Each successful candidate had to complete a Form of Acceptance and sign a standard agreement.

Condition 3(b) in the letter of offer which is material for purposes of this case reads:

> **3(b) Syarat-syarat bayaran selepas tamat latihan**
> Selepas tamat kursus DUA tahun dan selepas lulus sekali lagi Pemeriksaan Doktor, tuan/puan akan di terima sebagai guru dalam Tingkatan Gaji Yang di Persatukan dan di undang mengikut syarat-syarat Perkhidmatan bagi Peraturan Gaji Yang di Persatukan itu. Tuan/Puan akan di beri jawatan sabagai seorang guru oleh Lembaga Pengurus atau Lembaga Pengelola sekolah-sekolah yang berkenaan dan tidak akan di anggap sabagai pekerja Kerajaan. Tuan/Puan juga di haruskan boleh di tempatkan di mana-mana jajahan di Tanah Melayu ini selama lima tahun dari masa tamat latihan mengikut syarat-syarat perjanjian tuan/puan dengan kerajaan.

Translated it means:

> **Conditions of pay after the completion of the course** - after the completion of two year course and on passing medical examination you will be accepted as a teacher on the UTS scale and shall abide by the service conditions relating thereto. You will be employed as a teacher by the relevant School Board of Governors or Management and shall not be treated as a civil servant.

One of the other conditions is that upon acceptance of the offer each appellant was to execute an agreement in five copies (p. 508 AB).

After the two years training the plaintiffs were asked to do an extra year specialist course of training. Upon graduation they were put on attachment on 1 April 1972 on a commencing salary of RM230 p.m. lower than UTS which was RM310 for men and RM275 for women. In this regard however it is to be observed that the appellants were placed on attachment as they had not then successfully completed their course of training. The payment of RM230 was merely an allowance. The date of completion of the course was 6 June 1972. By letter *Perlantikan Kejawatan Sementara* dated 21 September 1972 (AB 27-28), the appellants were offered a new scale T2 under the Aziz scheme with a starting salary of RM370. This

according to the appellants would still be lower than the salary they would have got if they had been placed first under UTS and then opted into Aziz. The appellants claim that there was a breach of the agreement and pray for an order declaring that they are entitled to salaries and allowances in accordance with UTS as it existed on 1 May 1969.

It is clear that at the time the agreement was entered into between the appellants and the respondent the only salary scale in force relating to trained teachers applicable to the appellants was the UTS scale but on completion of the course of training the UTS was no longer in existence. The only salary scale in force then was the salary scale under the Aziz scheme.

In this appeal the appellants rely on the following grounds:

That the learned Judge erred in law and in fact in

(1) upholding the respondent's plea that the contract could not be fulfilled on account of frustration and that it had been discharged

(2) not accepting the submission of the appellants that Circular 10/1971 did not apply to the appellants who were then not yet Government servants.

(3) not following the decision of *Thambipillai v. The Government of Malaysia* [1969] 2 MLJ 206.

(4) holding Service Circular 10/1971 as having the force of law at the material time.

(5) ...

(6) holding that r. 103 of Service Circular No. 10/1971 barred the appellants from being placed under the UTS scale.

Before dealing with the merits of the appeal, we would observe that the Judge has held that the agreement (AB5-8) provided not only for training but also for employment. Reference was made to Clause 1(c) thereof. We see no reason to disagree.

In our view the agreement has spelt out quite clearly that the employment was to be at the option of the respondent exercisable at any time within twelve calendar months of the completion of the course. A student required to serve was to be appointed upon terms and conditions for the time being applicable to the post and at a salary in accordance with the scales of salaries for the time being in force relating thereto. The words "for the time being in force relating thereto" used in Clause 1(c) with reference to scales of salaries may be construed to mean that the appellants were to be subject to whatever scales of salaries relating to the post of a trained teacher in force at the time of the employment. The Judge however ruled this out and held that in the light of the respondent's admission the scale intended was the UTS. The Judge also held that at the time of the execution of the contract the consensus *ad idem* of both parties as regards the salary scale related to the UTS and hence posed to himself this question: "Can the defendants of their own motion alter the scale to one of a different character from what was agreed before?"

Now, one of the respondent's defences in the Court below was that the contract could not be fulfilled on account of frustration and the Judge found substance in this plea.

It is common ground that on the coming into force of the Aziz scheme the UTS was abolished. The Aziz scheme was embodied in Circular 10/1971 (15 December 1971). It is stipulated under para. 2 of the circular that teachers will only be recruited to the Education Service under the scheme. The scheme was adopted by the Government upon acceptance of

the report of the Aziz Commission appointed by the Yang di-Pertuan Agong under the Commission of Enquiry Act 1950 (PU (B) 41 - 27 January 1970) to review teachers' salaries. After due consideration the Judge concluded that the contract between the parties was frustrated. He further concluded that in consequence the respondent could not legally place the appellants under UTS and to do so would be illegal. Reference was made by the Judge to the case of *C.B. Reilly v. The King* [1934] AC 176, to support his finding that the respondent could not within the law employ the appellants under the UTS and the contract was therefore discharged.

The appellants have contended that there was no frustration of the contract. *C.B. Reilly's* case, they said, cannot apply to the present case. It is submitted that the UTS was not abolished but merely suspended and was therefore still in existence. The appellants have also contended that if there was to be a frustration of the contract it had to be such that the whole of the contract could not be performed. In this case, they maintained, it was possible to amend circular 10/1971 to accommodate this group to enable performance of the contract.

The appellants' case was in substance founded on contract and to succeed in their claim fundamentally they have to establish that there was a breach of the contract. It is not in dispute that they accepted the offer and executed the agreement as required under para. (b) of the letter of offer and it is their contention that one of the terms of the contract was that they should be placed on UTS if on completion of their course they were required by the respondent to serve. The Judge quite rightly held that it was the parties' consensus *ad idem* that the scale intended was the UTS. What seems clear to our mind is that it was outside the contemplation of and unforeseen by the parties that UTS would cease to be in force at the time of the appellants' employment. It is also clear that it was not in the minds of the parties that the UTS would be reviewed and substituted or replaced by another salary scheme as had happened in this particular case. In the present case the appellants are not questioning the Government's right to accept the recommendation of a salaries commission and to effect changes in the terms and conditions of any particular service. The question therefore is if another salary scale is substituted and such scale would cover the appellants should they, if required to serve, be not appointed upon the terms and conditions for the time being applicable to such post and at a salary in accordance with the scales of salaries for the time being in force relating thereto? We are not strictly concerned with the terms and conditions applicable to the post. They are not in issue. The sole issue here is the salary or rather the salary scale in particular the quantum. What we therefore have to consider is whether by reason of the substitution of the salary scale as set out in Service Circular 10/1971 consequent upon the acceptance by the Government of the Aziz Report it became impossible for the respondent to perform that part of its contractual obligation and that therefore the contract was discharged by frustration.

Assuming there was in law frustration, then in that event the Judge was perfectly right in holding that the contract was discharged on ground of impossibility of performance. With respect we do not agree. We are inclined to think that there was no frustration and the reason is that it was capable of being performed. The relevant provision on the doctrine of frustration is set out under our Contracts Act 1950, s. 57(2) which reads:

> (2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

The introductory passage in a chapter dealing with discharge by frustration in "*The Law of Contract in Malaysia and Singapore - Cases and Commentary*" by Visu Sinnadurai at p. 487/8 reads:

> A contract is frustrated when there is a change in the circumstances which renders a contract legally or physically impossible of performance. According to the House of Lords in the case of *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corpn. Ltd.* [1942] AC 154, the doctrine `is only a special case of the discharge of contracts by an impossibility of performance arising after the contract was made'. Section 57(2) of the Contracts Act, 1950 states the doctrine thus:
>
> > A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.
>
> The Act does not define the word 'impossible'. However, it appears that the wording of the section envisages two main instances of frustration - when a contract to do an act becomes (a) impossible or (b) unlawful. It is clear that the frustration should be supervening and subsequent to the formation of the contract. Furthermore, it should be some event which the promisor could not prevent, as a 'self-induced frustration' does not discharge a party of his contractual obligation. *Maritime National Fish, Ltd. v. Ocean Trawlers, Ltd.* [1935] AC 524.

With reference to the present case, the question is whether the change in the salary scale rendered performance impossible. Before answering the question we would refer to the English law with regard to the proper test of frustration. The law on this point is succinctly set out in "*Chitty on Contracts - General Principles*" 24th Edn., p. 658/9 as follows:

> In view of the decision of the House of Lords in *Davis Contractors Ltd. v. Fareham UDC* [1956] the proper test for frustration may be formulated as follows: If the literal words of the contract were to be enforced in the changed circumstances, would this involve fundamental or radical change from the obligation originally undertaken? In this case Lord Radcliffe said:
>
> > ... frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni.* It was not this that I promised to do ... There must be...such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for [1956] AC 696, 729.
>
> Lord Reid put the test for frustration in a similar way. 'The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end'. (*Ibid* at p. 721). Later in his speech, (*Ibid* at p. 723) he approved the words of Asquith LJ that the question is whether the events alleged to frustrate the contract were 'fundamental enough to transmute the job the contractor had undertaken into a job of a different kind, which the contract did not contemplate and to which it could not apply.' *Parkinson (Sir Lindsay) & Co. Ltd. v. Comissioners of Works* [1949] 2 KB 632, 667.

It would seem that the question is one of construction of the contract and in this regard we again refer to "*Chitty on contracts*", same edition at p. 659/60 where it is stated:

> Both Lord Reid and Radcliffe emphasised that the first step was to construe 'the terms which are in the contract read in the light of the nature of the contract, and of the relevant surrounding circumstances when the contract was made', [1956] AC 696, 720 -721 (per Lord Reid). From this construction the Court should reach an impression of the scope of the original obligation, that is, the Court should ascertain what the parties would be required to do in

order to fulfil their literal promises in the original circumstances. This impression will depend on the Court's estimate of what performance would have required in time, labour, money and materials, if there had been no change in the circumstances existing at the time the contract was made. The Court should then examine the situation existing after the occurrence of the event alleged to have frustrated the contract, and ascertain what would be the obligation of the parties if the words of the contract were enforced in the new circumstances. Having discovered what was the original 'obligation' and what would be the new 'obligation' if the contract were still binding in the new circumstances, the last step in the process is for the Court to compare the two obligations in order to decide whether the new obligation is a 'radical' or 'fundamental', change from the original obligation, Per Lord Reid, in *Tsakiroglou & Co. Ltd. v. Noblee Thorl GmbH*, [1962] AC 93 at p. 118. It is not simply a question whether there has been a radical change in the circumstances, but whether there has been a radical change in the 'obligation' or the actual effect of the promises of the parties construed in the light of the new circumstances. Was 'performance ... fundamentally different in a commercial sense'? (*Ibid* at p. 119).

Their Lordships also agreed that it is a matter of law [1956] AC 696, 723 for the Court to construe the contract in the light of the facts existing at its formation and then 'to determine whether the ultimate situation ... is or is not within the scope of the contract so construed'. [1956] AC 696, 721. It is submitted that the House of Lords has accepted the view that the test for frustration is objective [1956] AC at p. 728 and that frustration is a matter of positive judicial intervention. It is not a subjective inquiry into the actual or presumed intention of the parties, as was suggested by the older theory of the implied term, since the discharge of a contract on the ground of frustration occurs automatically upon the happening of the frustrating event, and does not depend upon any repudiation or other act of volition on the part of either party".

In short it would appear that where after a contract has been entered into there is a change of circumstances but the changed circumstances do not render a fundamental or radical change in the obligation originally undertaken to make the performance of the contract something radically different from that originally undertaken, the contract does not become impossible and it is not discharged by frustration.

Before we embark upon an inquiry whether, in view of the change of circumstances namely the substitution of a new salary scale under the Aziz scheme and the abolition of the UTS, there was frustration of the contract, it is appropriate at this point to consider the merit of the appellants' contention that the respondent should not be allowed to rely on frustration if it itself created the frustration, that is, if it was a self-induced frustration. The appellants have alleged that the Government was the author of the Aziz scheme and itself effected the abolition of the UTS. We are unable to see substance in this argument because in matters relating to qualifications for appointments and conditions of service the Government is the deciding authority and the power is provided by law. Such authority cannot be made subject to any agreement that may be entered into between the Government and another. Instead such agreement must be read subject to the authority by law conferred upon the Government. It is our view therefore that there was no question of any self-induced frustration. Basically the question remains whether in fact there was frustration of the contract. It is in this regard that the test laid down in *Davis Contractors'* case seems relevant. The test is an objective one to determine whether there has been a radical change in the actual effect of the promises of the parties construed in the light of the new circumstances.

As a first step in the enquiry we would consider the status of the Service Circular. It is to be observed that the Judge has said and we quote:

> The UTS upon coming into force of the Aziz Scheme has been suspended and from the date of Circular No. 10 of 1971 (13 December 1971) which embodied the Aziz Scheme, it is stipulated under Clause 2 that teachers will only be recruited to the Education Service under the Scheme. This Aziz Scheme was adopted by the Government and *gazetted* as a result of the Aziz Commission report. The Commission was appointed by the Yang di-Pertuan Agong under the Commission of Enquiry Act 1950 and *gazetted* in PU (B) 41 dated 27 January 1970 with the terms of reference generally to review teachers' salary. The Commission having completed their enquiry submitted their report and which was accepted by the Government in the form of Service Circular No. 10/1971 aforesaid".

Clearly the Service Circular came to be issued after the Government had approved the Aziz Commission Recommendations. The Commission was an independent body established under an Act of Parliament and charged by law with specific terms of reference. One of its functions was to submit recommendations on salary schemes relating to teachers to form not only the basis of a revision of salaries of those in the service but also to provide terms and conditions of service and salary scales for new teachers.

In our view, the Judge made a correct finding of law when he held that the conditions of appointment and conditions of service as embodied in Service Circular No. 10/1971 had the force of law. The Judge made this finding in the light particularly of Article 132(2) of the Federal Constitution which empowers the Government to regulate the terms and conditions of persons in the public service. The introduction by the Government of a new salary scale cannot be said to have been effected with a view to denying the right, contractual or otherwise, of any particular person or group of persons. Neither was it the object of the respondent to escape performance of a contractual obligation under any contract. The Government accepted the Aziz recommendations and in fact put into force an improved salary scale and it was applicable to the appellants. Thus the UTS was abolished and ceased to apply to the appellants. After that the appellants were given a higher commencing salary and a more favourable scale than that of the UTS.

Our view is that it is wrong to say that the contract was not capable of being performed. It is also the appellants' contention that the contract was not frustrated and that the respondent could perform the contract but the respondent must amend Circular 10/1971 to accommodate them. We do not see the necessity to do that. The Circular was applicable to the appellants. We also see no merit in the appellants' contention that the Circular could not apply to them as throughout the Circular the word "employee" was used and they were not employees. Paragraph 3 of the Circular specifically provides that:

> 3. From the date of this Circular, recruitment of teachers into the existing 'Government Education and Teaching Services' and the 'Unified Teaching Service' shall be suspended and, thereafter, teachers will only be recruited to the Education Service referred to in para. 1 above, except that Missionary Teachers may continue to be employed in accordance with reg. 24 of the Regulations for Aided English Schools in the Straits Settlements, 1936, and reg. 23 of the Regulations for Aided English Schools in the Federated Malay States, 1936.

And para. 1 of the Circular reads:

> Following the recommendations of the Royal Commission on the Teaching Services, West Malaysia (the Aziz Commission), the Government has set up the 'Education Service'. The Education Service is an open service and its members, who will be known as 'Members of the Education Service' (hereinafter referred to as 'Members') will be directable and deployable to perform teaching, administration or other duties that may be reasonably required of them.

Paragraph 2 sets out the four categories of the education service and category T relates to the appellants. The salary scales are to be found on pp. 61 and 62 of the circular.

Apart from para. 3 of the Circular which provides that "thereafter, teachers will only be recruited to the Education Service referred to in para. 1 above ..." there is revealed that as from the date when the Circular came into force the intake of teachers to the teaching service would be in accordance with the terms and conditions and salary scales provided under the Circular. This is reinforced by the provisions which govern the terms such as "entry qualifications", "application", "probationary period" and so forth. These provisions clearly invalidate the appellants' contention that the appellants were not covered by Service Circular 10/1971. It is a fact that they were eligible for direct intake under one of the categories provided thereunder. The appropriate category was T2.

As for *Thambipillai's* case we do not see how that decision could support the appellants' contention. In that case the learned Judge had regard to the nature and effect of that particular service circular when he held that the service circular was no more than a mere declaration of policy. The same cannot clearly be said of Service Circular 10 of 1971.

Paragraph 1 of the Service Circular reinforced by para. 127 and 128 shows that the new terms and conditions of service as set out in the Circular supersede those rules and regulations which would cease to have effect and that steps were being taken to cancel and amend the relevant laws circulars, orders and instructions to being them in conformity with the terms of this circular.

The only remaining point raised by the appellants is that they should first be placed on UTS and then be allowed to opt to the salary scale under the Aziz scheme. We are in sympathy with the appellants and we fully appreciate the anomaly they alleged has arisen, particularly where it affects the total emoluments compared to those who a year earlier were placed on UTS and later converted to the Aziz salary scale. This is something that does not come within the purview of the Judge to deal with. The Judge quite rightly confined himself to the appellants claim as disclosed from the pleadings.

Moreover, we so not see how the appellants could on one hand claim the Circular 10/1971 is not applicable to them and on the other sought to be placed, or at any rate, to be allowed to opt into the Aziz Scale.

For the above reasons, it is our judgment that the learned Judge had not erred in law and in fact in arriving at his decision. We ourselves have reached the same conclusion although for somewhat different reasons.

Accordingly we would dismiss this appeal with costs.

Also found at [1983] 1 CLJ 73